IN THE HIGH COURT OF JUDICATURE AT BOMBAY

CIVIL APPELLATE JURISDICTION

SECOND APPEAL NO. 433 OF 1979

AND

SECOND APPEAL NO.434 OF 1979

1. Mohamad Hanif Husensaheb Mashal
2. Fakir Ahmed Husensaheb Mashal
3. Daudsaheb Husensaheb Marshal, minor by his guardian brother, Mohamad Hanif Husensaheb Marshal, Appellant No.1
4. Hamid Husensaheb Mashal, minor by his guardian brother Mohamad Hanif Houses sahib Marshal, Appellant No.1
5. Gafurbi wife of Husensaheb Mashal, since deceased by her legal representatives Appellant Nos. 1 to 4.
6. Karimbi wife of Ibrahim @ Husen Rachabhare since deceased by her legal representatives

6-A Ibrahim @ Husen Abdulla Rachabhare
6-B Abdul Hamid Husensaheb Rachabhare
6-C Ahmed Husensaheb Rachabhare minor by guardian Appellant No.6-A

7. Madarma wife of Ismail Tadpatri ...Appellants

Vs.

1. Chitasaheb Mirasaheb Mashal, since deceased by his heirs

1-A Ibrahim Chitasaheb Mashal
1-B Bujrugbi Allabax Sutar(dismissed for want of non-prosecution vide Order dt.19-2-1982)
1-C Julekhabi Husensaheb Chitapure by legal heirs
1-C(i) Smt.Taherabi Husensaheb Pajnighar
1-C(ii) Imambi Faridsaheb Gudur
1-C(iii) Sharifabi Maliksaheb Shaikh
1-D Rabiyabi Chandsaheb Maktal
1-E Jahirabi Chitasaheb Mashal
1-F Manni Gulab
1-G Fatimabi Gaju Manglur
1-H Hajra Chitasaheb Mashal
1-I Ismail Chitasaheb Mashal by legal heir
1-J Hamid Chitasaheb Mashal
1-K Jaitunbi Chitasaheb Mashal
1-L Kadar Chitasaheb Mashal

2. Jaharabi w/o Chitasaheb Mashal ...Respondents

Mr.A.A.Kumbhakoni for the Appellants
Mr.A.M.Khairadi for Respondent No.1(A)
Mr.S.S.Shah for Respondent Nos. 1-F to 1-L

CORAM: A.S.OKA, J.

DATED: AUGUST 11, 2004.

ORAL JUDGMENT :

1. Second Appeal No.433 of 1979 was admitted on 26th June 1979 by observing that substantial question of law is that evidence has not been properly appreciated and appropriate conclusions are not drawn. This Court also observed that the Courts below have ignored the legal position as stated in Mulla's Principles of Mahomedan Law (18th Edition) page 61-62.

2. Second Appeal No.434 of 1979 was admitted on the same date and was ordered to be heard along with Second Appeal No.433 of 1979. It is obvious that this Second Appeal was also admitted on the same substantial questions of law.

3. Both the Second Appeals are being disposed of by a common Judgment. Second Appeals arise out of Regular Civil Suit Nos.1043 of 1969 and 366 of 1970. Second Appeal No.433 of 1979 arises out of R.C.S.No.366 of 1970 and Second Appeal No.434 of 1979 arises out of R.C.S.No.1043 of 1969. For

appreciating the submissions which are made before me on the substantial questions of law indicated in Order dated 26th June 1979, it will be necessary to refer to facts of the case in brief. The dispute in the Appeals is as regards municipal House No.76 situated at Paccha Peth, Solapur. Two rooms in the suit house No.76 are subject matter of the Decree for possession passed by the Trial Court. The original Respondent No.1 in the Second Appeals Chitasaheb Mirasaheb Mashal claims to be the owner of the suit house on the basis of sale deed dated 22nd July 1929 executed by one Fatimabi. Husensaheb, the father of the Appellant Nos. 1 to 4 is the younger brother of the Respondent No.1 Chitasaheb. The case of the Respondent No.1 is that the said Husensaheb was only 10 years old at the time of purchase of the said house by the Respondent No.1. The case of the Respondent No.1 is that as his parents had expired, Husensaheb was brought up by him and therefore, he was allowed by the Respondent No.1 to occupy the two rooms in the said house. The said Husensaheb expired on 18th August 1967. The Appellants are legal representatives of the said Husensaheb. The case of the Respondent No.1 is that after the demise of Husensaheb he called upon the Appellants to hand over vacant possession of the said two rooms. The appellants refused to hand over the possession. On the contrary the Appellants issued a notice dated 19th March 1968 to the Respondent No.1 claiming that the said house was jointly purchased by Husensaheb and the Respondent No.1. The respondent No.1 replied to the said

notice and revoked the licence granted to the Appellants to occupy the said two rooms in the said house. The case of the respondent No.1 is that Husensaheb and subsequently the Appellants were allowed to occupy the said two rooms only because Husensaheb was the Younger brother of Respondent No.1 and they have no right, title and interest in respect of the said house including the said two rooms. Therefore, the Respondent No.1 and the original Respondent No.2 Jahirabi filed R.C.S.No.366 of 1970 against the Appellants for possession of the two rooms and for mesne profits.

4. The said suit was resisted by the Appellant Nos. 1 to 5 by filing written statement. In the written statement it was contended that though Husensaheb was minor on the date of acquisition of the said house, he was employed in a mill on part time basis and was also doing carpentry work. A specific contention is raised that the said house was purchased out of the funds of Husensaheb and the Respondent No.1 Chitasaheb and sale deed was executed only in the name of the Respondent No.1 as he was the elder brother. A contention was raised that Husensaheb and the Respondent No.1 executed a mortgage in respect of the said house in favour of one Masud Appabhai in the year 1934. It is contended that the said Husensaheb was residing in the said rooms as owner thereof and in fact he was collecting rent from the tenants of the said house. A contention is raised that as the Appellants have filed Regular Civil Suit No.1043 of 1969 for

partition against the Respondent No.1, as counter blast to the said suit this suit was filed by the Respondent No.1. Lastly, in the alternative, a contention was raised that Husensaheb had become owner of the said two rooms by adverse possession in his life time and therefore the Appellants are the owners of the two rooms.

5. The Appellants filed R.C.S.No.1043 of 1969 against the Respondent No.1, Respondent No.2 and four others claiming one half share in the said house and for partition and separate possession of one half share in the said house. The Respondent No.1 resisted the said suit by filing written statement. In the said written statement, a contention was raised that the Respondent No.1 has purchased the said house by registered sale deed dated 22nd July 1929 from his own funds and Husensaheb was allowed to occupy the two rooms only by way of a licensee.

6. Both the suits were heard together by the learned Trial Judge. The learned Trial Judge held that the Appellants have failed to prove that the suit house was jointly purchased by the said Husensaheb and the Respondent No.1 from their joint earnings. In view of these findings, the learned Trial Judge accepted the case made out by the Respondent No.1 that the Appellants were merely licensees in respect of the two rooms in the suit house. Therefore, the suit filed by the Appellants was dismissed and suit for possession by the

Respondent No.1 and the Respondent No.2 was decreed.

7. Being aggrieved by the Judgments and Decrees passed in the said two suits, the Appellants herein preferred separate Appeals in the District court. The Appeals were dismissed by common Judgment dated 23rd April 1979. The learned 2nd Extra Assistant Judge, Solapur held that the Respondent No.1 has established that the suit house was purchased by him from his own funds. He held that the Appellants failed to establish that the suit house was jointly purchased by the said Husensaheb and the Respondent No.1. Being aggrieved by the Judgments and Decrees of the Courts below the Appellants have preferred the present Second Appeals.

8. The learned Counsel for the Appellants submitted that deceased Husensaheb and the Respondent No.1 executed a registered deed of mortgage in respect of the suit house in favour of one Masud Appabhai. He submitted in the deed of Mortgage it is stated that the suit house was purchased in the name of the Respondent No.1 and was in possession of Husensaheb and the Respondent No.1. He submitted that from the very fact that the name of Husensaheb was incorporated in the said document as co-mortgagor, it was clear the Respondent No.1 admitted that Husensaheb was co-owner or joint owner of the property with the Respondent No.1. He submitted that there was evidence on record to show that though Husensaheb was minor at the time of acquisition of the

house, he was employed in a Mill. He submitted that even in the deed of mortgage his occupation is described as service. He submitted that though the principles of governing Hindu Law may not be applicable as the parties are mohamedans, it cannot be ignored that when the document of sale was executed, the Respondent No.1 was major and the said Husensaheb was minor and therefore as per the prevailing practice in those days name of only the Respondent No.1 was incorporated in the sale deed. He submitted that at the time of execution of the sale deed in the year 1929 admittedly Husensaheb was staying in the family of the Respondent no.1. Even subsequent conduct of the Respondent No.1 shows that he always stated that Husensaheb is co-owner of the house along with him.

9. The learned Counsel for the Respondent Nos.1-F to 1-L submitted that merely because name of Husensaheb is incorporated in the deed of Mortgage as co-mortgager, one cannot jump to the conclusion that Husensaheb had jointly purchased the suit property with the Respondent No.1. He submitted that it is obvious that Husensaheb at the relevant time was residing with the Respondent No.1-mortgagor and at the instance of morgagee name of Husensaheb must have been incorporated in the document of mortgage. He submitted that even the said document also shows that the suit house was purchased by the Respondent No.1.

10. The learned Counsel further submitted that the Courts below have recorded a findings of facts which are based on legal evidence on record and which need no interference in a Second Appeal under Section 100 of Code of Civil Procedure, 1908. He submitted that as the Appellants have failed to discharge the burden to prove the contribution of Husensaheb, the Decree for possession against the Appellants must follow as they have not asserted any other independent right over the two rooms in the house. The learned Counsel for the Respondent No.1-A also supported the impugned Judgments and Decrees.

11. I have considered the rival submissions. In the suit filed by the Appellants a specific case is made out that the suit house was purchased on 22nd July 1929 out of funds of Husensaheb and the Respondent No.1. It is specifically stated that though Husensaheb was a minor at that time, he had source of income and he was a part time employee in a mill and was doing carpentry work. Thus, a specific case made by the Appellants is that the said Husensaheb had contributed to the Appellant of price of the suit property.

12. The Trial Court has referred to the oral evidence led by the parties. The Appellate Court has referred to the evidence of the Appellant No.1 who tried to depose that his father Husensaheb was having income in the year 1929. Considering the age of the Appellant No.1 at the time of

recording the evidence, the Appellate Court has noted that the Appellant No.1 must have born later and therefore he cannot have personal knowledge about the acquisition made in the year 1929. The Appellant No.1 admitted in the cross examination that he had no personal knowledge as to who had actually paid the consideration. A case was tried to be made out by the Appellant No.1 that one Hannubi was present at the time of execution of the conveyance dated 22nd July 1929. The said Hannubi was also examined as witness by the Appellants. In her deposition the said Hannubi has not deposed that she was present at the time of execution of the sale deed. All that she has stated is that both the brothers contributed towards consideration amount. Hannubi is the sister of Husensaheb and the Respondent No.1. She has stated that the suit house was purchased by the brothers after her marriage. Hannubi has stated that at the time of execution of sale deed Husensaheb was doing the work of carpentry and later on he was employed in a mill on half ticket. So the sister of Husensaheb did not depose on oath that at the time of execution of the sale deed though the said Husensaheb was minor he was in the part time employment of the mill. The Appellate Court has therefore observed that the evidence of Hannubi also does not support the case of the Appellants. In fact, the said Hannubi tried to state that even the wife of Husensaheb was receiving some income. The said case was not made out by the Appellants in the suit filed by them. She admitted in the cross examination that Chitasaheb told

Husensaheb that till Husensaheb secures another accommodation elsewhere he may stay in the two rooms of the house.

13. The Appellate Court has extensively referred to the evidence of one Haji Kasimsaheb whose age at the time of deposition stated to be of 115 years. He stated that he was on visiting terms in the family of both the brothers. He tried to depose that Husensaheb was working in the mill on half ticket and used to hand over his earnings to his elder brother Respondent No.1. He also stated in his evidence that wife of Husensaheb was also used to give her earnings to the Respondent No.1. Again it must be noted that neither in the written statement filed by the Appellants to the suit filed by the Respondent No.1 nor in the plaint filed by them a case is made out that wife of Husensaheb was earning and she was contributing any amount to the Respondent No.1. The case made out as regards income of wife of Husensaheb appears to be an improvement made by the Appellants at the stage of trial which was really beyond the scope of pleadings. In so far as the evidence of Kasim is concerned, both the Courts below have recorded cogent reasons for discarding his evidence. In paragraph No.13 of the Judgment of the Appellate Court, it is pointed out that the case made out by Haji Kasimsaheb is not consistent.

14. It is difficult to understand why a case was made out that wife of Husensaheb was earning and was contributing to

the Respondent No.1. There is nothing on record to show that Husensaheb was married when the suit house was purchased in the year 1929. If the age of Husensaheb was 10 to 12 years at the time of purchase of the suit house, in normal course, his wife must be younger to him. The Appellants have tried to make out a case which cannot be accepted on the face of it.

15. The reliance is placed on the deed of mortgage is not enough to prove the case of the contribution of Husensaheb. The explanation given by the Respondent No.1 that the name of Husensaheb was incorporated at the instance of the mortgagee appears to be correct.

16. considering the oral evidence on record, the Courts below have accepted the case of the Respondent No.1 that he was the exclusive owner of the suit house. This is not the case where the Appellate Court or the Trial Court has relied upon the evidence which is not admissible or on the documents which are not proved. The oral evidence and documentary evidence is scanned by both the Court and every document admitted in evidence is discussed and deposition of witnesses are considered in detail. As the Second Appeal is very old pertaining to the year 1979, I have gone through the pleadings and notes of evidence to ensure that no injustice is caused to any party. After having perused the pleadings and notes of evidence, it cannot be said that the findings

which are recorded by both the Courts below are perverse. The view taken by both the Courts below is certainly a possible view which can be taken on the basis of evidence on record. As held by the Apex Court in various cases the Appellate Court is the final court of facts. As stated earlier the findings of the Court below are based on oral as well as documentary evidence on record and there is neither any perversity nor any illegality in the findings. Hence, no interference is called for in the Second Appeal under Section 100 of Code of Civil Procedure,1908.

17. At this stage the learned Counsel for the Appellants stated on instructions from the Appellant No.1 who according to him is present in the Court that two rooms in the suit house are in possession of the Appellant No.1, his two wives and a daughter and that the rooms are used for business and residence. The learned Counsel further submitted that the Appellant No.1 has no other accommodation available and for decades he is occupying the said two rooms. He submitted that the Appellant No.1 is ready and willing to file an undertaking of himself and two wives and his daughter who are occupying the two rooms to vacate the rooms within the time fixed by this Court. He also stated that other Appellants will also file necessary undertakings stating therein that they are not in possession of the said two rooms and they will not obstruct if the Appellant No.1 hands over the possession of the said two rooms to the Respondents within

the time fixed by this Court.

18. The learned Counsel for the Appellants states that time of at least one year be granted. The said request is opposed by the learned Counsel for the Respondents. He submitted that the Second Appeal is of the year 1979 and therefore the Appellants have already enjoyed sufficient time.

19. Considering the fact that the parties are closely related and for a long time two rooms are in possession of the Appellant No.1, time to vacate deserves to be granted till 30th April 2005 subject to filing undertaking referred to above in this Court within a period of four weeks from today.

20. If the undertaking of all the Appellants and undertaking of both the wives of the Appellant No.1 and his daughter are not filed within a period of six weeks, Decree for possession will become executable forthwith.

21. Hence, subject to above direction Second Appeals are dismissed with no order as to costs.

Judge.